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No. 99-1223

In The

Supreme Court of the United States

JOHN HANLON AND RUTH ANN HANLON, PARENTS AND NEXT FRIENDS OF MICHAEL HANLON, and MARK PLAVIN AND TONY REISS-PLAVIN, PARENTS AND NEXT FRIENDS OF RACHEL PLAVIN,

Petitioners,

-vs.-

DONNA E. SHALALA, SECRETARY OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In the Supreme Court of the United States

NO. 99-1223

JOHN HANLON AND RUTH ANN HANLON, ETC., ET AL.,
PETITIONERS

-vs.-

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PETITIONERS COMBINED SUPPLEMENTAL AND REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

I.

1. Our Petition demonstrated that the Court of Appeals for the Federal Circuit created great potential for mischief by holding that a special master's "discretion"—apparently to admit evidence—controls the determination of a motion to reopen a "Decision" in the Vaccine Program. The Vaccine Act expressly provides for "final determination" when a "decision" is issued. 42 U.S.C. § 300aa-12 (d) (3) (A) (i) (special master "shall issue a decision . . . with respect to whether compensation is to be paid" which shall "include findings of facts and conclusions of law"); § 300aa-12 (f) (findings of fact and conclusions of law of the Court of Federal Claims are "final determinations").

A separate "Decision on Entitlement" issues in vaccine cases, before the appropriate compensation is at issue. A

"decision" requires the full opportunity for presentation of the parties' evidence and positions. *See* the five subsections of § 300aa-12 (d) (3) (B); *see also* Guideline IX, Guidelines for Practice Under the National Vaccine Injury Compensation Program (special masters devise procedures for taking evidence and argument, without being bound by Rules of Evidence).

Any formal "decision" by a special master is a "final determination" under the Act. The special masters are an adjunct of the Court of Federal Claims, but the Office of Special Masters is vested with the sole trial jurisdiction. 42 U.S.C. § 300aa-12 (d). Therefore, unless a "decision" after bifurcated trial in the Office of Special Masters does **not** constitute "(t)he findings of fact and conclusions of law of the United States Court of Federal Claims," such a pronouncement has been explicitly denominated by Congress as a "final determination." Because no actual trial is afforded as a matter of right in the Program (*see,* 42 U.S. C. § 300aa-12 (d) (3) (B) (v); *see also Murphy v. Secretary of DHHS,* 23 Cl. Ct. 726 (1991), *aff'd* 968 F.2d 1226 (Fed. Cir.) *cert. denied*, 506 U.S. 974 (1992)), the result of an adversarial trial on entitlement *a fortiori* should rise to the dignity of the established Law of the Case.

We therefore conclude that "entitlement decisions" made in petitioners cases, after an "omnibus" process involving tuberous sclerosis (TS) cases, and spanning four calender years, must have embodied the Law of the Case, pending damages.

2. Reinforcing our argument for finality is the fact that when Special Master Laura A. Millman was assigned to preside over the TS cases in 1991, she also orchestrated "interlocutory" judicial review[1]. After numerous adversarial "omnibus" trial proceedings were held, there followed formal "decisions" which

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[1]See, *Costa v. Secretary of DHHS,* 26 Cl. Ct. 866, 868-869 (1992) (questioning "interlocutory" review, finding that "the case at bar does not involve an interlocutory order or decree of the Special Master" making the finding that "here, the decision of the Special Master was final, and not intermediate," and noting that "the outcome of this case on appeal was necessary to adjudicate the remaining TS cases.")

were subject to the appellate pronouncements of *Costa* and *Suel*[2]. Rachel Plavin and Michael Hanlon, in 1994, were given the benefit of that extensive, fair and full "omnibus" adjudication. Thus, Special Master Millman's 1994 entitlement decisions in the petitioners' respective cases were "final determinations" under the Act. They adopted the legal doctrine and the universal factual understandings derived in the first "omnibus" proceedings[3] in TS-vaccine cases.

II.

1. We also directed the Court's attention (fn. 12, page 14, Petition for Certiorari) to the course of a parallel case, *Copeland v. Secretary of DHHS*, case no. 90-867V. In *Copeland*, Special Master E. LaVon French conducted an adversarial trial, even prior to the "omnibus" proceedings in *Costa* and *Suel*. Then, on motion of the government, she considered the expanded *Costa* proceedings, prior to entering her decision on entitlement[4]. Special Master French found Table entitlement to compensation, and considered herself bound by the *Costa* holding. *Copeland*, at *7. The Special Master also found entitlement under "causation-in-fact" principles. *Id.*, fn. 19.

Copeland, over vigorous protest by the petitioner therein (represented, like most TS petitioners, by the firm of the undersigned counsel) was reassigned in early 1996 to Special

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[2] *Suel v. Secretary of DHHS*, 31 Fed. Cl. 1 (1993) ("*Suel I*").

[3] After appeal and remand for "clarification" in *Costa, supra*, the Secretary reopened the record to present another comprehensive expert showing of its "factors unrelated" defense. *Costa, Conservator of Costa v. Secretary of DHHS*, 1992 WL 365421, *2 (Fed.Cl.). Special Master Millman's Decision on Remand (*id.*, at *4) rejected this presentation, which was the virtual blueprint of the reopening evidence in the basic order appealed herein, the TS Omnibus Decision, *Barnes et al. v. Secretary of DHHS*, 1997 WL 602115 (Fed. Cl. Spec. Mstr.).

[4] *Copeland v. Secretary of DHHS*, 1993 WL 12894 (Fed.Cl. Spc. Mstr Jan 7, 1993).

Master Millman. *Copeland* has now been re-adjudicated by Special Master Millman. The new *Copeland* "Order" rejects Special Master French's 1993 Decision on Entitlement, *supra.* It does so only in terms of allegedly unbridled "discretion" to do so. Special Master Millman ignored the fact that in Special Master French's view, the "new" omnibus evidence was not dispositive. Millman ruled that her "inquisitorial" power is justification for overriding a prior decision of a fellow special master, without so much as a by-your-leave, and indeed, without a critique of the other tribunal's decision. Adopting the Secretary's argument that Special Master French's Decision on Entitlement was "interlocutory," the Order which inflicts this result has been filed of even date as additional Appendix material.

2. Special Master Millman's Order in *Copeland* demonstrates a state of quasi-judicial anarchy which could not exist without the misbegotten doctrine of "discretionary" reopening which animates the petition for certiorari in this matter. This "discretion" necessarily empowers a **special master,** not a judge, to overcome the highly deferential standard of review which would restrain the Court of Federal Claims itself. *See* 42 U.S.C. § 300aa-12 (e) (2). This potential was fully realized in *Copeland.* Yet in the United States Court of Federal Claims, Special Master French's Decision would be sustainable against any showing short of arbitrary and capricious action. *Id.*

Special Master French's *Copeland* "Decision on Entitlement" is nonetheless supported by substantial evidence. The "omnibus" evidence fully developed by the end of 1992 is "substantial" no less than in *Suel,* affirmed in late 1999 by the Federal Circuit[5]. The government essentially admits this (brief in opposition, p. 15). Therefore, the "new" TS Omnibus evidence

[5] *Suel v. Secretary of DHHS,* 192 F.3d 981,1999 WL 722551 (Fed. Cir.).

is not "dispositive," and **not** grounds for a new trial. No new trial should have been granted in *Barnes* and its companion cases[6].

The difference between *Copeland* and *Barnes* is best described in a formulation of "law of the case" from this Court, quoted by Judge Black in affirming compensation for David Suel:

> "That this was a close case, however, counsels in favor of abiding by the law of the case. (Citation[7]). Simply because a different panel might reach a different conclusion, does not mean that the earlier decision is 'clearly erroneous.'" *Suel*, 192 F.3d at 985.

III.

1. Petitioners do not assert, as the government implies, that there is no power to reconsider in a Program case. The petitioners seek only to have the same law applied to them as is applied to other supplicants for justice, in every court in the land. There must be a presumption against reconsideration, not a presumption in its favor.

The Government's opposition to the Petition for Certiorari depends upon the questionable argument that the facts recently found in *Barnes* are "dispositive." But factual discussion adds virtually nothing to the analysis of the Petition. It is principally germane only to demonstrating the anarchy which prevails in the

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[6]Respondent in her List of Parties falsely asserts that the List of Parties in the petition "erroneously includes" those petitioners also included on the caption of *Barnes*. But any TS Omnibus petition could show a compensable case *per se* for a Table injury under *Costa* and *Suel*, the "first omnibus" cases, formatted to establish the Law of the Case for TS. The grant of certiorari, and elimination by this court of "discretionary" serial reopening, would reinstate the legally proper compensability of these cases, and *Barnes*, directly on review herein, would become a nullity.

[7]*Id.* 192 F.3d at 985. Judge Black relied here on *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 at 819 (1988) ("The doctrine of law of the case is ... a heavy deterrent to vacillation on arguable issues." (quoting 1B James W. Moore, et al., Moore's Federal Practice ¶ 0.404[1] (1984)).

Office of Special Masters. The entire set of TS "entitlement" cases demonstrates that the still-prevailing scientific and medical facts concerning TS were repeatedly held to defeat the "factors unrelated" defense to Table compensation, in the *Suel*, *Costa*, and *Copeland* cases, in addition to their numerous predecessors, less strenuously litigated. And the appellate opinions in *Suel* thwart the government's factual arguments, while they embody the original TS petitioners' theory of the case for "Table" entitlement. This theory, too, was upheld by the court of appeals.

Judge Merow reversed Special Master Millman for her denial of compensation to David Suel, a child whose radiologically severe tuberous sclerosis cannot be distinguished from the tuberous sclerosis with which Rachel Plavin is afflicted[8]. Judge Merow relied upon the doctrine of Judge Tidwell's earlier *Costa* holding:

> "The effect of a pertussis vaccine on the TS child in this case clearly caused, for the purposes of the National Childhood Vaccine Injury Act, the 'serious deterioration' contemplated by the framers of the Act . . . . The court need not tarry to conclude that a seemingly normal child who has never seized, but who suffers a latent pre- existing condition that is awakened by the vaccine also falls well within the intent of Congress to compensate under the Act." *Suel I*, 31 Fed. Cl. at 9-10, citing *Costa*, 26 Cl.Ct. at 870.

2. The *Costa* and *Suel* litigation consumed years, while the related cases languished. Years **after** *Costa*, and after the numerous TS petitioners have been deprived of their previously adjudicated entitlement in every case except *Suel*, the sum total of the "newly discovered evidence" underlying *Barnes* was held in Judge Merow's second *Suel* opinion to be "relatively scant."

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[8]To extend the comparison, Stephen Costa's tuberous sclerosis would, if anything, be called more "severe" than Michael Hanlon's TS.

Suel v. Secretary of DHHS, Case No. 90-934V (Fed. Cl. May 8, 1998), unreported slip op. at 4. ("*Suel II*.")

Petitioners can clearly see, and beg this Court to also see, that the government seeks to obscure the most pertinent "factual" inquiry. Rather than inquiring into the nature of the "new evidence" itself, this Court must review the sequence of procedural events. First, it is indisputable that all but one piece of the allegedly pivotal, so-called "peer reviewed literature" —consisting with that one exception of expert witness reports provided during the litigation and subsequently published—was conceived **after** the motion for reconsideration was granted. Second, even the "new omnibus" witnesses were designated literally years after the motion to reopen was granted. And the "impetus" for the motion (described p.12, brief in opposition), the only allegedly "new" evidence in existence at the time of the motion, was indisputably cumulative. The Mayo Clinic literature simply confirmed one of the given and accepted premises in *Suel I*[9], to-wit, that the more "tubers" found in the cerebral cortex of the individual with TS, the higher is the risk for the development of seizures and mental retardation[10].

3. The assertion is false (brief in opposition at 5) that there was a "proffer" of the "new" and allegedly "dispositive" evidence, prior to Special Master Millman's grant of the government's motion for reconsideration. The "extensive briefs" the government describes (*id.*) were devoted to the issue now before this Court, that is, the propriety of reopening in the absence of newly discovered evidence. Inasmuch as no evidentiary showing was made—and no showing could have been made—to satisfy the universal test and high threshold for "newly discovered evidence," the reopening was improper as a matter of

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[9] *See, e.g., Suel, supra*, 31 Fed.Cl. at 4 ("if a child is diagnosed as having more than five lesions on the brain, he will most likely suffer from seizures").

[10] *See also Costa, Conservator of Costa v. Secretary of Dept. of Health and Human Services, supra*, 1992 WL 365421 at *2 ("Stephen was predisposed to have seizures and mental retardation because he had more than five tubers on his brain.")

law. The rule below in the Court of Appeals, dispensing with such a threshold, is also highly improper, and grounds for certiorari, as a dramatic departure from accepted practices.

Herein below, the "final determination" was set aside, and the merits of the defense were reopened, and **then** the government was allowed to expend literally hundreds of thousands of dollars to overwhelm the petitioners, and to induce reversal of doctrine—appellate **and** "omnibus." The Special Master's ultimate rejection of the law of the case came about because of a comprehensive rehash of the evidence, but the evidence itself was substantially the same. The government received multiple "bites of the apple."

4. Even if the matter of reopening and reconsideration is committed to the soundest exercise of "discretion," the reopening in this matter would be suspect in the extreme. But both the ruling of the court of appeals, and the arguments of the government herein, ignore the vital provision of the statute at 42 U.S.C. § 12 (f) which denominates the entitlement decision as a "final determination." The *ex cathedra* proposition repeated over and over by the government's brief in opposition is that the "entitlement decision" is intended to be "interlocutory." There is no such Congressional designation, much less expression of intent, concerning an "entitlement decision." The statute does not support the government's position.

This Court may also note how far the government will go to stretch the Act, seeking to vest the special masters with a "duty" to entertain motions for reconsideration. A case in point is the argument (brief in opposition pages 9 and 12) that 42 U.S.C. § 12 (d) (3) (B) (iv) requires consideration of "all relevant written information." In fact, this subsection requires only that an opportunity be afforded, **before** announcing a decision, for "written information" to be submitted by interested parties. This manifests the intent of Congress for a "no-fault" and "expeditious" proceeding. Under the very next subsection, even a hearing is optional. 42 U.S.C. § 300aa-12 (D) (3) (B) (v).

Thus, it is absurd for the government to postulate that subsection (iv) is the source of a duty to grant serial reopening.

5. The position the government took regarding *Suel* in the court of appeals has undergone radical transformation. In its *Suel* petition for rehearing to the Federal Circuit, the government insisted that Judge Merow's reversal of the special master was **not**, as held by Judge Black's *Suel* opinion[11], a "final judgment." The government argued that as an "interlocutory" order, Judge Merow's *Suel I* opinion was subject to near-mandatory reconsideration. (That the government argues for such—see page 12, brief in opposition—is demonstrative of how aberrational the practice countenanced below actually is.) Now, it is disingenuous that the government's brief in opposition attempts to distinguish *Suel* from the instant cases and it companions, on the basis of some different "procedural posture." There is no relevant difference in this respect.

A Decision on Entitlement is a "final determination" both before and after review by the Court of Federal Claims. The relevant posture in petitioners' cases, prior to reopening, was identical to the posture of *Suel* immediately **after** Judge Merow's *Suel I* reversal in 1993. *Per se* entitlement for Table injuries was the rule in TS cases, as a the result of adversarial, "omnibus," trial-type litigation, spanning **years** of time and embracing the entire spectrum of medical and scientific issues. The special master and the Court of Federal Claims together constituted the trial court in David Suel's case, while the special master alone, in the many other TS cases following *Suel*, had "finally determined the controlling legal issue." (This is Judge Black's more specific holding, 192 F.3d at 984, citing *Maier v. Orr*, 754 F.2d 973, 981 (Fed. Cir. 1985), his use of the words "final judgment" notwithstanding.) The entitlement decision post-review in *Suel I*, and the instant cases (with *Copeland*), prior to review, were

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[11] *See, Suel* 192 F.3d at 984 ("Judge Merow's judgment on entitlement was final in 1993.")

equally entitled to finality. None were "interlocutory." They simply were "pre-judgment."

Simply stated, the instant case brings forth a system wide issue which is more than worthy of review, and the exercise of supervisory jurisdiction by this Court. Supreme Court Rule 10. Nowhere else in the long history of the use of special masters in Anglo-American tradition has a special master been vested by default with more authority than the trial court to which the master is an adjunct. And the court of appeals has given the special masters unfettered discretion, more than is afforded to a trial court. The neglect for traditional notions of finality, as demonstrated in *Copeland*, empowers a special master to make a legal nullity of years of litigation and even review. That such is the reality under the guise of "inquisitorial" powers and duties is fatal to the institutional integrity of the Vaccine Program. This Court, and none other, can rectify that deplorable circumstance.

Respectfully submitted this 2nd day of May 2000.

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